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ANTITRUST LAW IN THE EUROPEAN COMMUNITY AND THE UNITED STATES: A COMPARATIVE ANALYSIS

*Gabriele Dara**

I. INTRODUCTION

It is a fundamental economic assumption that every subject which operates in an open market strives to maximize its profits. One method of achieving this end would be to force all other competitors out of the market so that the only remaining subject, being the sole producer (i.e., reaching a monopoly), may fix as it wishes the price of the goods it supplies. An alternate method, if it is not possible to attain a monopoly, would be to reach an agreement with the other competitors to fix the price of the goods, each competitor thus maximizing the profits on its own share of the market. The costs of such methods of operation are borne by the ultimate consumer, not only in terms of price, but also in terms of quality, since a producer able to control the price of a product does not have any incentive to improve it. Public concern for the harm caused by such practices has been based on the threat they could pose, by aggregating resources and wealth in a few giant companies, to the economic and ultimately political freedom of individuals. Nevertheless, such arguments are not free from self contradiction. While antitrust legislation favors a competitive free market, it may also prevent uncompetitive firms from being driven out of the market. Furthermore, the sanctions imposed by such legislation may discourage competitive firms from enlarging their share of the market through improvements in technology or efficiency.¹

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1. For a legal and economic analysis of monopoly and antitrust law, see R. Posner, *Economic Analysis of Law* (2d ed. 1977) and W. Hirsch, *Law and Economics, An Introductory Analysis* (1979).

Since the early fifteenth century,² common law courts have refused to enforce contracts construed to impose an unreasonable restraint on trade, as such contracts have been considered contrary to public policy.³ The first statute, however, which expressly condemned anti-competitive behavior was the Sherman Act of 1890,⁴ passed by the Congress of the United States out of fear of the enormous power concentrated in the railroad and oil trusts. The provisions of the Sherman Act, which unlike the common law doctrine granted a right of action not only to individuals but also to the government, were given further elaboration by the Clayton Act of 1914,⁵ which expressly prohibited price discrimination and certain types of mergers, and by the Federal Trade Commission Act of 1914,⁶ which established a federal agency of the same name to regulate competition in the market.

On the other side of the Atlantic the statutory reaction to anti-competitive practices was much slower. Apart from the Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948, passed in the United Kingdom, and the West German Gesetz gegen Wettbewerbsbeschakungen of 7.27.1957, none of the other European countries developed any substantial antitrust legislation prior to the establishment of the EEC.⁷

The antitrust provisions contained in articles 85 and 86 of the Treaty of Rome,⁸ which established the EEC, thus take on a particular significance for the regulation of the European economy. Not only do those provisions represent the first exhaustive European body of rules against anti-competitive behavior, but, because of the increased number of nations which have become members of the EEC, they enjoy an extensive reach.⁹

2. Dyer's Case, Y.B. II Henry 5, f. 5, pl. 26 (1414).

3. 5 J. Holdsworth, *History of English Law* 58-62 (1936).

4. Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1973 & Supp. 1987)).

5. Clayton Act, ch. 323, § 1, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12-27 (1973 & Supp. 1987)).

6. Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41-58 (1973 & Supp. 1987)).

7. See Hearings before the Antitrust and Monopoly Subcomm. of the Senate Judiciary Comm., 88th Cong., 1st Sess. 768 (1964) (*Anti-trust Development in the European Common Market*, Pts. 1 and 2).

8. Treaty Establishing the European Economic Community, March 25, 1957, Belgium-Germany-France-Italy-Luxembourg-Netherlands No. 4300, 298 U.N.T.S. 11 (also known as the Treaty of Rome) [hereinafter EEC Treaty].

9. EEC Treaty articles 85 and 86 provide as follows:

ARTICLE 85

1. The following shall be prohibited as incompatible with the common market:

Before entering into a detailed analysis of the EEC rules on competition as compared with the American antitrust legislation,¹⁰ it is useful

all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
 - (b) limit or control production, markets, technical development, or investment;
 - (c) share markets or sources of supply;
 - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
 - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

ARTICLE 86

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

10. It may be useful to remember the comment of Advocate-General Mayras about the risk of a comparative approach to EEC and United States antitrust law: "[I]t would be bold to make a systematic rapprochement between American [antitrust] law and Community law." *ICI v. Commission* (Cases 48-49/69; 51-57/69) [1972] E.C.R. 619, [1972] 2 C.M.L.R. 557, 570 (also known as the *Dyestuffs* cases).

to make some general observations pertaining to the different purposes pursued by the two bodies of law.

As a general remark it cannot be denied, at least in light of the timing factor, that "the European Community has heavily borrowed from the American antitrust experience."¹¹ Nonetheless, the purposes of articles 85 and 86 are basically different from those underlying the American statutes. This may be attributed to the necessity of reading articles 85 and 86 in connection with the provisions of articles 2 and 3(f) of the Treaty of Rome.¹² Article 2 identifies as one of the main purposes of the EEC the promotion "throughout the Community [of] an harmonious development of economic activities, a continuous and balanced expansion . . . an accelerated raising of the standard of living and closer relations between the States belonging to it."¹³ Article 3(f) recognizes as important the need for "the institution of a system ensuring that competition in the Common Market is not distorted."¹⁴

Thus, it appears clearly that the goal set by the Treaty of Rome for its antitrust regulations is economic integration within the EEC and the creation of a common market, while still avoiding "a weakening of competition [which] would be contrary to the goals of the Common Market."¹⁵

The American antitrust statutes, on the contrary, seem at first glance to take a completely different approach. Unlike the prohibitions of the EEC system which are designed to accomplish certain specific goals apart from the sheer protection of competition, i.e., the economic integration between the Member States, and which thus may tolerate anti-competitive behavior to the extent such toleration helps to reach those goals, the restrictions imposed by the American statutes have been interpreted for a long time as tending mainly to ensure "free an unfettered competition as a rule of trade,"¹⁶ regardless of the side benefits that any challenged behavior may have for the economy as a whole, or for some particular area of technological development.¹⁷

11. Jones, *American Antitrust and EEC Competition Law in a Comparative Perspective*, 90 L.Q.R. 191, 193 (1974).

12. *Italy v. Council and Commission* (Case 32/65) [1966] E.C.R. 389, [1969] C.M.L.R. 39; *Commercial Solvents Corp. v. Commission* (Cases 6-7/73) [1974] E.C.R. 223, [1974] 1 C.M.L.R. 309.

13. EEC Treaty art. 2.

14. EEC Treaty art. 3(f).

15. *Continental Can Co. v. Commission* (Case 6/72) [1973] E.C.R. 215, [1973] 1 C.M.L.R. 199, 224.

16. *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4, 78 S. Ct. 514, 517 (1958).

17. For a critical view of the antitrust policy based on its negative economic effects, see R. Bork, *The Antitrust Paradox: A Policy at War with Itself* 54 (1978), where the author concludes: "Fragmentation for its own sake confers no clear gain, and it makes economic processes more costly."

However, the American antitrust statutes are expressed in general terms,¹⁸ and the evolutionary pattern of the judicial interpretation of the reach of those statutes seems to be oriented toward a restrictive reading of their provisions, and particularly of those of the Sherman Act, in a fashion concerned more with balancing the negative and positive effects of anti-competitive behavior than with flatly protecting competition.¹⁹

II. ARTICLE 85 EEC TREATY AND SECTION 1 SHERMAN ACT

Article 85 of the EEC Treaty

Section One

Section one of article 85 of the Treaty of Rome prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market."²⁰

The Treaty does not define "undertaking." However, the European Court of Justice (the ECJ) and the Commission of the European Community (the Commission) have, in a number of cases, provided an explanation of the meaning of that term. An "undertaking," for the Treaty to apply, may be not only a company but also an individual,²¹ provided the natural person, otherwise out of the reach of article 85, "engages in economic activities."²² The profit motive, however, has not been considered an essential feature of an "undertaking," and thus an association of trade associations,²³ and state-owned corporations²⁴ (within

18. The Sherman Act applies to any "combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1 (Supp. 1987). It also applies to "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C.A. § 2 (Supp. 1987). In contrast, the Clayton Act, although clearly enumerating several types of unlawful behavior, has been interpreted in a broad fashion in the light of its clear connection with the Sherman Act.

19. See text accompanying *infra* notes 181-83.

20. EEC Treaty art. 85.

21. See *Reuter v. BASF A.G.*, O.J. Eur. Comm. (No. L 254) 40 (1976), [1976] 2 C.M.L.R. D44; *AOIP v. Beyrard*, O.J. Eur. Comm. (No. L 6) 8 (1976), [1976] 1 C.M.L.R. D14.

22. *Reuter v. BASF A.G.*, [1976] 2 C.M.L.R. at D55.

23. See *IAZ Int'l Belgium SA v. Commission* (Case 96/82) [1984] 3 C.M.L.R. 276; *FRUBO v. Commission* (Case 71/74) [1975] E.C.R. 563, [1975] 2 C.M.L.R. 123.

24. See *Italy v. Commission* (Case 41/83) [1985] 2 C.M.L.R. 368; and R. Schulte-Braucks, *European Telecommunications Law in the Light of the British Telecom Judgment*, 23 Common Mkt. L. Rev. 39, 48 (1986). It is not clear if a State, with regard to its

the limits posed by article 90 of the Treaty) have also qualified as "undertakings" within the meaning of article 85.

The decisions of the ECJ also shade some light on the meaning of the term "enterprise." In this respect it has been held that article 85 does not apply to the relations between a parent and a subsidiary company which, "although having a separate legal personality, enjoys no economic independence."²⁵

Both the ECJ and the Commission have construed very broadly the terms "agreement, decision by association of undertakings and concerted practices." Thus, it has been said that not only contracts binding under the national law of the parties but also non-binding agreements²⁶ or simple understandings²⁷ may violate the provisions of article 85.

The meaning of the term "decisions by associations of undertakings" may seem to be equivalent to "concerted practices." There are, however, some differences. As has been pointed out, "A concerted practice involves an intentional coordination of market behavior . . . while a decision may have anti-competitive effects without there being any intentional horizontal agreement or understanding."²⁸

The first important case in which the Court attempted to define a concerted practice was *ICI v. Commission*,²⁹ one of the so-called *Dyes-tuffs* cases. On that occasion the Court inferred the existence of a concerted practice from a variety of evidence, including the concordance of the rate and timing of the price increase made by the challenged companies and the existence of previous informal contacts between them. At the same time the Court clarified the distinction between a concerted practice and an agreement, holding that a concerted practice is a "form of co-ordination between undertakings which, without going so far as to amount to an agreement properly so called, knowingly substitutes a practical co-operation between them for the risks of competition."³⁰

legislative power, is also subject to the provisions of article 85. See *Association des Centres Distributeurs Edouard Leclerc v. Au Ble Vert* (Case 229/83) [1985] 2 C.M.L.R. 286, and Fifteenth Report on Competition Policy, by the Commission of the European Community 93 (1986).

25. *Beguelin Import Co. v. G.L. Import Export SA* (Case 22/71) [1971] E.C.R. 949, [1972] C.M.L.R. 81; see also *Centrafarm BV v. Sterling Drug Inc.* (Case 15/74) [1974] E.C.R. 1147, [1974] 2 C.M.L.R. 480. On point also is *Re Kodak*, 13 O.J. Comm. Eur. (No. L 147) 24 (1970), [1970] C.M.L.R. D19.

26. *FEDETAB v. Commission* (Cases 209-15/78 and 218/78) [1980] E.C.R. 3125; [1981] 3 C.M.L.R. 134.

27. *Community v. National Panasonic (UK) Ltd.* 25 O.J. Eur. Comm. (No. L 354) 28 (1982), [1983] 1 C.M.L.R. 497.

28. R. Whish, *Competition Law* 169 (1985).

29. [1972] E.C.R. 619, [1972] 2 C.M.L.R. 557.

30. *Id.* at 622.

In a subsequent case³¹ the Court went further, stating that it is not necessary that an actual plan has been worked out between the parties to prove the existence of a concerted practice. This rule, however, generally does not apply in those cases in which the behavior of a firm has been determined not by the desire of establishing a concerted practice, but by the fact that the adopted behavior was the only reasonable reaction to the prevailing market conditions.³² In fact, the Court has been increasingly careful in evaluating the evidence of the existence of concerted practices submitted by the Commission.³³ In certain cases, however, notably in the presence of unilateral behavior such as the avoidance of export to certain markets³⁴ or the refusal to supply certain dealers,³⁵ the Court has been ready to consider as a concerted practice activity that may well be a reasonable response to certain market conditions.³⁶

The prohibition of article 85 reaches the conclusion of agreements "which have as their object or effect the prevention, restriction or distortion of competition."³⁷ However, only those agreements "which may affect trade between Member States"³⁸ are subject to the prohibitions of article 85, a limitation which applies no matter what the degree of impact an agreement may have on competition. The requirement of an effect on trade between the Member States has been defined as "the boundary between the areas respectively covered by Community law and the law of the member-States."³⁹ Still, both the Court and the Commission have given a broad construction to this requirement, considering it satisfied when the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between the Member States.⁴⁰ Thus, that an agreement involves only one nation does not mean that it may not somehow be subject to the proscriptions of article 85.

31. *Suiker Unie v. Commission* (Cases 40-48/73, 50/73, 54-56/73, 111/73, 113-14/73) [1975] E.C.R. 1663, [1976] 1 C.M.L.R. 295, 425.

32. See *id.* and *Zuchner v. Bayerische Vereinsbank AG* (Case 172/80) [1981] E.C.R. 2021, [1982] 1 C.M.L.R. 313.

33. *Compagnie Royale Asturienne des Mines SA v. Commission* (Cases 29-30/83) [1985] 1 C.M.L.R. 688.

34. *Hasselblad (GB) Ltd. v. Commission* (Case 86/82) [1984] 1 C.M.L.R. 559.

35. *AEG-Telefunken v. Commission* (Case 107/82) [1984] 3 C.M.L.R. 325.

36. For the harm that such a broad interpretation of the principle of "concerted practices" may cause, see *Korah, Concerted Practices*, 36 Mod. L. Rev. 220 (1973).

37. EEC Treaty art. 85.

38. EEC Treaty art. 85.

39. *Hugin Kassaregister AB v. Commission* (Case 22/78) [1979] E.C.R. 1865, [1979] 3 C.M.L.R. 345, 373.

40. *La Technique Miniere v. Maschinenbau Ulm* (Case 56/65) [1966] E.C.R. 235, [1966] C.M.L.R. 357, 375.

This principle was first set forth by the Court in the *Grundig* case.⁴¹ Grundig had granted an exclusive license to Consten, a French company, to market its products in France. In order to protect this licensee, Grundig forbade its other licensees from exporting its products to France and also allowed Consten to register in France under its name the trade mark GINT (Grundig Int'l). When another French firm, Unef, started to sell in France at a lower price than Consten some Grundig products it had imported from Germany, Consten sued Unef for unfair competition and trademark infringement. The ECJ, deciding the case upon the request of a French court, rejected the allegations, reasoning that:

In the present case, the contract between Grundig and Consten, on the one hand by preventing undertakings other than Consten importing Grundig products into France, and on the other hand by prohibiting Consten from re-exporting those products to other countries of the Common Market, indisputably affects trade between member-States.⁴²

In the same case the Court also ruled that "the fact that an agreement favours an increase, even a large one, in the volume of trade between [Member] States, is not sufficient to exclude the ability of the agreement to 'affect' the trade in the above-mentioned direction."⁴³

In the *CementhandeLaren* case,⁴⁴ where the defendants tried to distinguish *Grundig* on the basis that the challenged agreement did not concern exports, the Court went further, dismissing the defense because "[a]n agreement extending over the whole of the territory of a member-State has, by its very nature, the effect of consolidating a national partitioning, thus hindering the economic interpenetration to which the Treaty is directed."⁴⁵

Article 85 may also apply to agreements pertaining to trade outside the Common Market if the agreement is limited to imports,⁴⁶ or if, although primarily or even completely involving exports, the agreement has the side effect of preventing, restricting or distorting competition within the EEC. Thus, in the *Commercial Solvents*⁴⁷ case, the Court

41. *Grundig-Verkaufs GmbH v. Commission* (Cases 56/64, 58/64) [1966] E.C.R. 299, [1966] C.M.L.R. 418.

42. [1966] C.M.L.R. at 472.

43. *Id.*

44. *Vereeniging van CementhandeLaren v. Commission* (Case 8/72) [1972] E.C.R. 977, [1973] C.M.L.R. 7. See also *Salonia v. Poidomani* (Case 126/80) [1981] E.C.R. 1563, [1982] 1 C.M.L.R. 64.

45. *CementhandeLaren*, [1973] C.M.L.R. at 21.

46. *Re Franco-Japanese Ballbearings Agreement*, 17 O.J. Comm. Eur. (No. L 343) 19 (1974), [1975] 1 C.M.L.R. D8.

47. *Commercial Solvents Corp. v. Commission* (Cases 6-7/73) [1974] E.C.R. 223, [1974] 1 C.M.L.R. 309.

rejected the defense that 90% of the defendant's production was exported outside the EEC. In so holding, the Court declared that it was bound to consider every effect "of the conduct complained [of,] . . . [no] matter whether the conduct relates to . . . exports or trade within the Common Market[,] once it has been established that . . . [it] will have repercussions on the competitive structure within the Common Market."⁴⁸

On the other hand, with respect to the effect of a foreign firm's behavior in the Common Market, the Commission seems to have adopted⁴⁹ the "effect doctrine," under which "an agreement, wherever made, that may reasonably be expected to have substantial effects in the common market infringes Article 85(1)."⁵⁰

The mischief addressed by article 85 is the "prevention, restriction or distortion of competition within the Common Market."⁵¹ This provision covers not only the effective but also the merely intended restriction of competition. Citing this principle, the Court has held⁵² that the words, "object or effect" (of distorting competition) have to be read disjunctively, and that, only if it is not clear that the purpose of an agreement is to restrict competition, then the consequences of the agreement should be considered.⁵³ In considering the effects of an agreement, it is sufficient for purposes of triggering application of article 85 that the impact of those effects is solely on third parties.⁵⁴ Furthermore, the prohibition of article 85 does not only extend to actual distortions of competition, but will also reach reasonably expected potential distortions.⁵⁵ However, in judging whether an agreement potentially may have an impact on the trade between Member States or may distort competition, its weight must be evaluated with respect to "the economic and legal context in which such agreements . . . are to be found."⁵⁶ Relying upon this rule in *Volck v. Vervaecke*,⁵⁷ the Court held that an agreement between parties which control only a negligible share of the

48. 1 C.M.L.R. at 342.

49. *Woodpulp*, 28 O.J. Comm. Eur. (No. L 85) 1 (1985), [1985] 3 C.M.L.R. 474. The appeals to the ECJ, Cases 89/85 and 142/85, are still pending.

50. V. Korah, *An Introductory Guide to EEC Competition Law and Practice* 29 (3d ed. 1986).

51. EEC Treaty art. 85.

52. *La Technique Miniere v. Maschinenbau Ulm* (Case 56/65) [1966] E.C.R. 235, [1966] C.M.L.R. 357; contra *Gleiss-Hirsch*, *Common Market Cartel Law* 62 (3d ed. 1981).

53. *La Technique Miniere*, [1966] C.M.L.R. at 375-76.

54. See *Italy v. Council and Commission*, [1966] E.C.R. 389, [1969] C.M.L.R. 39.

55. *Re Vacuum Interrupters Ltd.*, 20 O.J. Eur. Comm. (No. L 48) 32 (1977), [1977] 1 C.M.L.R. D67.

56. *Brasserie de Haecht v. Vilkins* (Case 23/67) [1967] E.C.R. 407, [1968] C.M.L.R. 26, 40.

57. (Case 5/69) [1969] E.C.R. 295, [1969] C.M.L.R. 273. See also *Cadillon v. Hoss* (Case 1/71) [1971] E.C.R. 351, [1971] C.M.L.R. 420.

market (in this case between 0.2 and 0.05%) is not covered by article 85, due to the economic weakness of the parties.

Since the Court never indicated the exact share of the market under which the rule set forth in *Volck* (the "de minimis rule") was to be applied, the Commission issued the so-called Notice on Minor Agreements,⁵⁸ which in its current form⁵⁹ exempts from the prohibitions of article 85 those agreements which, in spite of their being distortive of competition, affect no more than 5% of the market and whose participants have an aggregate turnover not exceeding 50 million ECU.⁶⁰ Proper understanding of this Notice requires further elaboration.

First, a firm may not escape the provisions of article 85 by entering into a number of contracts which, if taken singularly, would fall within the exemption created by the Notice, but which, if considered "as a whole[,] are such as to restrict the freedom of trade."⁶¹ In the *Brasserie de Haecht* case, for example, a Belgian beer producer had entered into several contracts with different owners of cafes. Under one of those contracts the plaintiff had consented to buy exclusively from Brasserie all the beverages required for his cafe for a period equal to the duration of a loan Brasserie had made to him. In a preliminary ruling, the Court found that, in spite of Brasserie's control of only a tiny share of the market, the agreement could be found incompatible with article 85, since those kinds of contracts were highly common in Belgium and had conferred on the beer producers a sort of monopoly.⁶²

Secondly, a large company cannot invoke the de minimis rule on the basis of the narrow share of the market it controls with respect to a single product.⁶³ It also must be pointed out that "the Notice (on Minor Agreements) . . . was issued for guidance only and . . . it has not legal effect."⁶⁴ Thus, the Court is not bound by the Notice, but may consider it as "a mitigating factor . . . when imposing fines on an undertaking which has relied upon it."⁶⁵

One final point concerning section one of article 85 deserves mention. On one hand the reach of article 85 is broader than it appears, because the enumeration of restrictive practices contained in section one is not

58. Notice on Minor Agreements, OJ [1970] C 64/1.

59. As amended Dec. 29, 1977, OJ [1977] C 313/3.

60. European Currency Units. (A monetary unit not actually in circulation but referred to in the official acts of the EEC and whose value is based on the value of a "basket" of the currencies of the member states of the EEC.)

61. *Brasserie de Haecht*, [1968] C.M.L.R. at 40.

62. See *id.* at 26, 38-41.

63. *Distillers Co. v. Commission* (Case 30/78) [1980] E.C.R. 2229, [1980] 3 C.M.L.R. 121.

64. *Miller Int'l Schallplatten GmbH v. Commission* (Case 19/77) [1978] E.C.R. 131, [1978] 2 C.M.L.R. 334, 342 (Opinion of Advocat-General Warner).

65. *V. Korah*, *supra* note 50, at 29.

all-inclusive,⁶⁶ for, as has been pointed out, "[t]he wording 'in particular' itself shows that the enumeration is not exhaustive Thus it is not relevant if one does not succeed in classifying a given case under one of the examples . . . [so long as] the general elements of the prohibition are satisfied."⁶⁷ On the other hand, there are certain areas of the economy which article 85 (as well as article 86) do not regulate, such as coal and steel undertakings,⁶⁸ nuclear energy,⁶⁹ agriculture,⁷⁰ transports,⁷¹ and, to some extent, the public sector.⁷²

Sections Two and Three

With respect to the two other sections of article 85, section two expressly declares void all agreements made in violation of section one, while section three provides the possibility of an exemption from those sanctions.⁷³

In order to obtain the said exemption the agreement must satisfy four conditions: (a) contribution to the improvement of the production or distribution of goods or to the promotion of technical or economic progress; (b) allocation to consumers of a fair share of the benefit; (c) avoidance of unnecessary restrictions; and (d) less than complete elimination of competition "in respect of a substantial part of the products in question." As a general remark it must be remembered that pursuant to article 9 (1) Regulation 17/62, the Commission is the only authority which has the power to grant an exemption, though its decisions may be reviewed on appeal by the ECJ. In that case the burden of proving that all four conditions to obtaining an exemption have been met lies with the undertaking. What follows is a brief overview of particular aspects of the four conditions.

(a) Two decisions in particular by the Commission illustrate the application of this first condition.⁷⁴ In *Re Rockwell-Iveco Agreement*,⁷⁵ the Commission granted the exemption for an agreement for the creation

66. See *supra* note 9.

67. Gleiss-Hirsch, *supra* note 52, at 92.

68. To which applies the European Coal and Steel Community (ECSC) Treaty.

69. To which applies the Treaty Establishing the European Atomic Energy Community (EURATOM), March 25, 1957, Belgium-Germany-France-Italy-Luxembourg-Netherlands No. 4301, 298 U.N.T.S. 169.

70. See EEC Treaty arts. 38-47.

71. See EEC Council Regs. 141/62, 1017/68.

72. See EEC Treaty art. 90 and *supra* note 24.

73. EEC Treaty art. 85, §§ 1-3.

74. In *Re United Processor GmbH*, 19 O.J. Eur. Comm. (No. L 51) 7 (1976), [1976] 2 C.M.L.R. D1, the exemption was granted because there was a chance that the conditions to grant it, although not present at the moment, were going to materialize in the future.

75. 26 O.J. Eur. Comm. (No. L 224) 19 (1983), [1983] 3 C.M.L.R. 709.

of a joint venture between an axle manufacturer and a truck manufacturer, which created "a rationalization of production [and] contributed to increase technical progress in the goods concerned."⁷⁶ In *Re De Laval-Stork VOF*,⁷⁷ the Commission granted the exemption for an agreement between an American and a Dutch turbine producer, observing that "the agreement prevents the creation of uneconomic capacity [and] has a decisive influence on costs by providing . . . that the jointly-owned plant will be able to . . . reduce the large proportion of the total costs represented by fixed costs."⁷⁸

(b) For the purposes of this provision, it has been held that other enterprises which use a particular product in the course of their trade may qualify as "consumers."⁷⁹ In some instances the Commission has refused to grant the exemption based on a finding that the agreement failed to yield a fair share to consumers. Thus, in *Re VBBB/VBVB Agreement*⁸⁰ it struck down a resale price agreement between two associations of Dutch language book sellers because the agreement would have deprived the consumers of the chance of obtaining a discount.⁸¹ Again, in *Re VNP and COPELBA*⁸² the Commission refused to grant an exemption for an agreement between two paper producers to exchange statistics of production. The exchange was deemed to be aimed at giving information about which products sold best, and hence designed for the "creation of a market situation . . . for the sole benefit of the producer and not of the consumer."⁸³

(c) In some cases the Commission has granted an exemption for agreements which, though they may restrict competition, have a beneficial effect on the market as proven by a "competitive weight analysis."⁸⁴ In a recent case⁸⁵ the Court suggested that certain agreements to restrain competition, using as an example franchise agreements, may be granted an exemption in the interest of preventing competitors from taking advantage of the expertise and assistance that one party (in this case the franchisor) supplies to the other (its franchisee).

76. 3 C.M.L.R. at 720.

77. 20 O.J. Eur. Comm. (No. L 215) 11 (1977), [1977] 2 C.M.L.R. D69.

78. 2 C.M.L.R. at D81.

79. See *Re ACEC/Berliet Agreements*, 11 O.J. Comm. Eur. (No. L 201) 7 (1968), [1968] C.M.L.R. D35.

80. 25 O.J. Eur. Comm. (No. L 54) 36 (1982), [1982] 2 C.M.L.R. 344.

81. 2 C.M.L.R. at 364.

82. 20 O.J. Eur. Comm. (No. L 242) 10 (1977), [1977] 2 C.M.L.R. D28.

83. 2 C.M.L.R. at D39-40.

84. See *Re De Laval-Stork VOF Joint Venture*, 20 O.J. Eur. Comm. (No. L 215) 11 (1977), [1977] 2 C.M.L.R. D69; *Re United Processor GmbH*, 19 O.J. Eur. Comm. (No. L 51) 7 (1976), [1976] 2 C.M.L.R. D1.

85. *Pronuptia de Paris v. Pronuptia de Paris Irmgard Schillgallis* (Case 161/84) [1986] 1 C.M.L.R. 414, 443.

(d) When the agreement totally eliminates competition the Commission will not grant the exemption. Thus, in *FEDETAB v. Commission*⁸⁶ the Court held that an agreement between a few Belgian cigarette producers which controlled 80% of the market completely excluded competition and could not be granted an exemption. However, when the product market is not well-defined and thus it is uncertain whether competition will be completely restricted, the Court has taken a more liberal approach, reversing the Commission's decisions refusing the exemption.⁸⁷ On the other hand, both the Court and the Commission have interpreted broadly the requisite of distortion of competition "within the Common Market." In *Ford Werke AG v. Commission* (II),⁸⁸ for example, the German subsidiary of the Ford Motor Company refused to supply its German dealers with right-hand drive cars in order to protect its dealers in the United Kingdom, who, due to exchange rate fluctuation, had difficulty competing with their German counterparts. The Commission declined to renew the exemption it had previously granted Ford, since the refusal to supply the cars tended to insulate the English market from competition. On appeal, the ECJ affirmed the Commission's decision on the ground that "the Commission . . . was obliged to take account of all the circumstances surrounding the application of that agreement and . . . thus . . . [took] the view that the mere refusal to supply German dealers with right-hand drive cars suitable for export was a key element in partitioning the Common Market artificially."⁸⁹

Finally, it must be pointed out that alongside with the individual exemptions already examined, there is the chance for certain kinds of agreements, relating to particular business sectors, to be automatically exempted without any notification to the Commission (which is required for individual agreements) pursuant to certain Council Regulations.⁹⁰

Section One of the Sherman Act

As has been pointed out, Section One of the Sherman Act, although similar to article 85, is expressed in broader terms. In fact, it applies to *any* "contract . . . combination . . . or conspiracy in restraint of trade among the several States, or with foreign nations."⁹¹

As far as the number of participants to the unlawful action is concerned, Section One, like article 85, only forbids activities performed

86. [1980] E.C.R. 3125, [1981] 3 C.M.L.R. 134.

87. See, e.g., *Kali & Salz AG v. Commission* (Cases 19-20/74) [1975] E.C.R. 499, [1975] 2 C.M.L.R. 154.

88. (Cases 25-26/84) [1985] 3 C.M.L.R. 528.

89. *Id.* at 546.

90. See EEC Council Regs. 1983/83, 1984/83, 2394/84, 123/85, 417/85.

91. 15 U.S.C.A. § 1 (1982).

by two or more persons or entities. In the EEC it has long been settled that wholly owned subsidiaries are not to be considered independent for the purposes of antitrust provisions.⁹² In the United States, however, until the recent decision of the Supreme Court in *Copperweld Corp. v. Independence Tube Corp.*,⁹³ the rule, first laid down in *United States v. Yellow Cab Co.*,⁹⁴ was that there might be an unlawful conspiracy between a parent and its subsidiary because "the fact of common ownership [could not] save them from any of the obligations that the law imposes on separate entities."⁹⁵ The Supreme Court, after an attempt to distinguish substance from form in *National Dairy Products Corp. v. United States*,⁹⁶ expressly overruled *Yellow Cab* in *Copperweld*, stating that "the very notion of agreement in Sherman Act terms between a parent and wholly owned subsidiary lacks meaning."⁹⁷ The Court stressed that, "in reality, a parent and a wholly owned subsidiary *always* have a 'unity of purpose or a common design,'"⁹⁸ a view held by the ECJ as well. Finally it must be pointed out that the Supreme Court and the ECJ share the same approach of holding liable under the antitrust statutes an association and its members who voluntarily follow the illegal practices agreed upon by all the members of the association.⁹⁹

Focusing now on the other elements of the activity proscribed by Section One, it is worth notice that the Supreme Court has construed the term "contract" to mean a binding agreement either express or implied.¹⁰⁰ The Court, however, has been liberal in considering the meaning of the term "agreement." Thus, in *United States v. Arnold, Schwinn & Co.*,¹⁰¹ an agency arrangement between a manufacturer and its distributors was held to be an agreement within the meaning of Section One.

Some differences between the interpretations of Section One and article 85 arise with respect to the application of the provision concerning "combination or conspiracy in restraint of trade." The American courts have in fact been stricter than the ECJ in recognizing the existence of

92. See text accompanying *supra* note 25.

93. 467 U.S. 752, 104 S. Ct. 2731 (1984).

94. 332 U.S. 218, 67 S. Ct. 1560 (1947).

95. *Perma Life Mufflers Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42, 88 S. Ct. 1981, 1986 (1968).

96. 350 F.2d 321, 327 (8th Cir. 1965), vacated on other grounds, 384 U.S. 883, 86 S. Ct. 1913 (1966). See also Areeda, *Intraenterprise Conspiracy in Decline*, 97 Harv. L. Rev. 451 (1983).

97. *Copperweld*, 467 U.S. at 771, 104 S. Ct. at 2742.

98. *Id.*, 104 S. Ct. at 2742 (emphasis in original).

99. See *Rosenbrough Monument Co. v. Memorial Park Cemetery Ass'n.*, 666 F.2d 1130, 1139-40 (8th Cir. 1981), cert. denied, 457 U.S. 1111, 105 S. Ct. 385, and compare it with *IAZ Int'l. Belgium BV v. Commission*, (Case 96/82) [1984] 3 C.M.L.R. 276.

100. *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 42 S. Ct. 150 (1922).

101. 388 U.S. 365, 87 S. Ct. 1856 (1967).

a combination or conspiracy, for they have always required clear and convincing evidence of conscious parallelism in economic behavior, while the latter has been satisfied with a lesser degree of proof, at least in the presence of parallel behavior.¹⁰²

As far as the proof of the intent to restrict trade is concerned, the Supreme Court seems in recent decisions to have, in certain respects, moved in the opposite direction than the ECJ. Until 1978 the general principle was that the intent to act in concerted restraint of trade, being a general intent, did not have to be proven directly, but could be inferred from the defendant's having engaged in a concerted action directed to restrain trade, or even from the fact that "a restraint or monopoly [had] result[ed] as a consequence of the defendant's conduct."¹⁰³ This well-established principle, consistent with the so-called *La Technique Miniere* test followed by the ECJ,¹⁰⁴ remained apparently unchanged by the Act in 1974 which upgraded violations of the Sherman Act from misdemeanors to felonies,¹⁰⁵ even though such a change would seem to require a higher degree of proof of criminal intent before conviction in order to be consistent with the general principles of criminal law. The Supreme Court did, however, eventually restore a certain degree of consistency with the rules of criminal procedure by introducing, in *United States v. United States Gypsum Co.*,¹⁰⁶ a prohibition against "reliance on a legal presumption of wrongful intent from proof of an effect on prices"¹⁰⁷; at the same time, however, the Court noted that this analysis "focuses solely on the elements of a criminal offense . . . and leaves unchanged the general rule [pertaining to] a civil violation."¹⁰⁸

In addition to showing the requisite intent, the existence of an actual agreement must be proven for there to be a violation of Section One. Of course, when there is no direct proof of the agreement, this may be shown by indirect evidence.

As briefly noted above, American courts have been reluctant to infer the existence of an actual agreement¹⁰⁹ simply from consciously parallel conduct without additional facts. As it has been said,

102. The distinction between "combination" and "conspiracy" has never been clear, and the latest decision of the Supreme Court which hinted to the problem seems to have completely blurred any distinction between the two terms. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42, 88 S. Ct. 1981, 1986 (1984). See also text accompanying *supra* note 95.

103. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610, 92 S. Ct. 1126, 1135 (1972).

104. (Case 56/65) [1966] E.C.R. 235, [1966] C.M.L.R. 357.

105. 15 U.S.C. § 1 (as amended in 1976).

106. 438 U.S. 422, 98 S. Ct. 2865 (1978).

107. *Id.* at 435, 98 S. Ct. at 2872.

108. *Id.* at 436 n.13, 98 S. Ct. at 2873 n.13.

109. *Theatre Enters. Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41, 74 S. Ct. 257, 259-60 (1954).

Conscious parallelism . . . always assumes whatever significance it might have from additional facts. Thus, conscious parallelism is not even evidence of agreement unless there are some other facts indicating that the decision of the alleged conspirators were *interdependent* [and] consistent with the individual self-interest . . . only if they all decided the same way.¹¹⁰

Again, the courts seem to be concerned with the "protection" of defendants from the criminal sanctions which may be inflicted upon them in cases in which "reasonable inference drawing degenerates into groundless speculation."¹¹¹ Thus, in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*¹¹² the Supreme Court affirmed the decision of the court of appeals, which had found that the simple refusal to supply suburban theaters with first-run movies was based on sound business reasons and did not amount to a violation of Section One. In so holding, the Court stated that it had "never held that proof of a parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense."¹¹³

Several years earlier,¹¹⁴ the Supreme Court had identified some of the factors required, in addition to parallel behavior, to support a finding of concerted activity. The most important and most widely followed by the courts¹¹⁵ are: (1) the existence of a common motive to enter into the agreement; (2) the failure to explain the parallel behavior as a rational response to market conditions; and (3) the knowledge that the concerted action was contemplated or sought by the other participants to the challenged scheme. In a more recent decision reaffirming these principles, the Supreme Court further specified that the burden of proof is on the plaintiff to show that there is evidence which "tends to exclude the possibility that the [defendant] was acting independently."¹¹⁶

110. Turner, The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 658 (1962). See also Note, Conscious Parallelism: The Business Judgment Defense in a Summary Judgment Context, 35 Hastings L. J. 115 (1983).

111. In Re Japanese Elec. Prods. Anti-trust Litigation, 723 F.2d 238, 303-04 (3d Cir. 1983), cert. granted, 105 S. Ct. 1863 (1984).

112. 346 U.S. 537, 74 S. Ct. 257 (1954).

113. Id. at 541, 74 S. Ct. at 259.

114. Interstate Circuit, Inc. v. United States, 306 U.S. 208, 222-25, 59 S. Ct. 467, 472-74 (1939).

115. Proctor v. State Farm Mut. Auto Ins. Co., 675 F.2d 308 (D.C. Cir. 1982); Paul Kadair, Inc. v. Sony Corp., 694 F.2d 1017 (5th Cir. 1983); Schoenkopf v. Brown & Williamson Tobacco Co., 637 F.2d 205 (3d Cir. 1980); Montana v. Superamerica, 559 F. Supp. 298 (D. Mont. 1983).

116. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 1471 (1984).

Finally, it should be noted that Section One, unlike article 85, does not provide a list, even a restricted one, of prohibited practices, but leaves to the courts the task of identifying them. An examination of the specific practices declared unlawful under Section One goes beyond the scope of this article. However, a comparative account of the general principle which leads the courts in their interpretation of the American antitrust statutes will be given in the last section of this work.¹¹⁷

III. ARTICLE 86 EEC TREATY AND SECTION 2 SHERMAN ACT

Article 86 of the EEC Treaty

Article 86 of the Treaty of Rome prohibits "[a]ny abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it . . . in so far as it may affect trade between Member States."¹¹⁸ It then provides an illustrative list of unlawful practices, such as unfair or discriminatory pricing or imposing supplementary obligations for the conclusion of a contract.¹¹⁹

The terms "undertaking" and "interstate trade" have received the same interpretation as under article 85. More troublesome, however, has been the interpretation of the term "dominant position." The analysis of both the ECJ and the Commission in this regard has focused on three fundamental issues: (a) the definition of the product market; (b) the definition of the geographic market; and (c) the degree of economic power enjoyed by one or more firms (in the case of a shared monopoly or oligopoly) within the said market.

The Product Market

In order to determine the existence of a dominant position it is necessary to define the product market in which the alleged dominant position is held. Although the ECJ has not given a clear test by which to determine a relevant product market, it seems inclined to use the interchangeability of products as a guideline. Thus, in an early case¹²⁰ in which the issue pertained to the alleged monopolization of the market of light metal cans for preserved meat, fish and the canning industry, the Court quashed the imposition of sanctions by the Commission,

117. See text accompanying *supra* notes 171-204.

118. EEC Treaty art. 86.

119. Korah, *Interpretation and Application of Article 86 of the Treaty of Rome: Abuse of a Dominant Position within the Common Market*, 53 *Notre Dame L. Rev.* 768, 769 (1978).

120. *Continental Can Co. v. Commission* (Case 6/72) [1973] *E.C.R.* 215, [1973] *C.M.L.R.* 199.

because it found absent proof "that competitors in other fields in the market for light metal containers cannot, by a mere adaptation, enter this market with sufficient strength to form a serious counterweight."¹²¹

Some years later, in *United Brands Co. v. Commission*,¹²² the Court, upholding the decision of the Commission, found that the market concerned (for bananas) was separate from the markets for similar goods (other fruits) because it was "singled out by special features distinguishing it from other [markets] . . . [and] only to a limited extent interchangeable with [the other goods] . . . [and was therefore] exposed to their competition in a way that is hardly perceptible."¹²³

The "interchangeability test," however, may prove inadequate in the situation where a good has more than one use, thus being at the same time part of two markets. In the only case in which the Court has been called upon to apply the interchangeability test to such a situation, it did not give a clear answer. In *Hoffman-La Roche v. Commission*,¹²⁴ Hoffman-La Roche (HLR) raised as a defense to the charge of having monopolized the vitamin market the fact that certain vitamins may be used for industrial purposes as antioxidants.¹²⁵ The Court, probably because of the inadequacy of the interchangeability test, preferred to rely on other aspects of the case to confirm the decision of the Commission, and thus avoided deciding whether the dominant position of HLR had to be tested against the market of vitamins for pharmacological use or the one for industrial use.

The Geographic Market

As with the product market, the need for a clear definition of the geographical market arises from the words "a dominant position within the common market or in a substantial part of it."

In the *Suiker Unie* case¹²⁶ the Court held that for this purpose it is necessary to take into account the geographic area in which the product

121. [1973] C.M.L.R. at 227.

122. (Case 27/76) [1978] E.C.R. 207, [1978] 1 C.M.L.R. 429.

123. [1978] 1 C.M.L.R. at 482-83. See also the decision of the Court in *Commercial Solvents* (Case 6-7/73) [1974] E.C.R. 223, [1974] 1 C.M.L.R. 309, where, in order to determine the relevant market for a pharmaceutical raw material, it applied a test aimed at verifying whether there was on the market "a raw material which could [have] been substituted without difficulty for nitropropane," the material whose supply had been ceased. [1974] 1 C.M.L.R. at 338.

124. (Case 85/76) [1979] E.C.R. 461, [1979] 3 C.M.L.R. 211.

125. [1979] 3 C.M.L.R. at 271. See also *L'Oreal NV v. De Nieuwe A.M.C.K. Pvba* (Case 31/80) [1980] E.C.R. 3775, [1981] 2 C.M.L.R. 235 and *NV Nederlandsche Banden-Industrie Michelin v. Commission* (Case 322/81) [1983] E.C.R. 3461, [1985] 1 C.M.L.R. 282.

126. *Suiker Unie*, [1975] E.C.R. 1663, [1976] 1 C.M.L.R. 295.

is marketed and the incidence of the product within the Community as a whole. In the *Michelin* case¹²⁷ the Court upheld the decision of the Commission which limited the geographic market for that case to only Holland, justifying its ruling on the ground that the proceedings were only directed toward the Dutch subsidiary of Michelin.

Degree of Economic Power

In order to assess the existence of a dominant position after having defined the relevant market, it is necessary to measure the degree of economic power the alleged dominant undertaking enjoys within that market. To this effect, the Court has defined the degree of economic power sufficient to trigger application of article 86 (i.e., a monopoly position) as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition . . . by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."¹²⁸

In determining whether there exists the material power to "behave independently," the Court has considered a number of factors. One of those is the market share possessed by the undertaking in question. The Court affirmed this principle in the *HLR* case when it said: "An undertaking which has a very large market share and holds it for some time . . . is by virtue of that share in a position of strength . . . [;] although the importance of the market shares may vary from one market to another . . . very large shares are in themselves, and save exceptional circumstances, evidence of the existence of a dominant position."¹²⁹

There are, however, other factors which the Court has taken into account to assess dominance. In the *United Brands* case the vertical integration of the company and an effective advertising campaign were believed to have established a substantial advantage over competitors,¹³⁰ while in other cases a particular expertise,¹³¹ an extensive and efficient sales network¹³² and an industrial property right¹³³ were considered relevant indicia of the existence of monopoly power.¹³⁴

127. *Michelin*, [1983] E.C.R. 3461, [1985] 1 C.M.L.R. 282.

128. *United Brands*, [1978] E.C.R. at 227, [1978] 1 C.M.L.R. at 486-87.

129. *Hoffman-La Roche*, [1979] E.C.R. at 521, [1979] 3 C.M.L.R. at 275.

130. [1978] E.C.R. 207, [1978] 1 C.M.L.R. 429.

131. *Michelin*, [1983] E.C.R. 3461, [1985] 1 C.M.L.R. 282.

132. *HLR*, [1979] E.C.R. 461, [1979] 3 C.M.L.R. 211.

133. *Hugin Kassaregister AB v. Commission* (Case 22/78) [1979] E.C.R. 1865, [1979] 3 C.M.L.R. 345, 373.

134. See also *General Motors Continental NV v. Commission* (Case 26/75) [1976] 1 C.M.L.R. 95. For a general overview of the problem, see Gyselen and Kyriazis, Article 86 EEC: The Monopoly Power Measurement Issue Revisited, 11 Eur. L. Rev. 134 (1986).

Unlawful Practices by an Undertaking in a Dominant Position

The list of practices by an undertaking in a dominant position which article 86 deems abusive is not exhaustive. It is however, possible to classify them into two main categories, namely, actions which harm competition in the Common Market in general, and actions which are unfair towards users of the product or final consumers.¹³⁵

The Court has clearly stated that mergers can be regarded as unlawful under the first category. Thus, in the *Continental Can* case,¹³⁶ in ruling on the lawfulness of the acquisition by a subsidiary of Continental Can of two European packaging companies with a substantial share of the market, the Court stated that "it cannot be supposed that the Treaty . . . intended in article 86 to permit undertakings, by merging into an organic unit, to obtain such a dominant position that any serious possibility of competition is almost eliminated."¹³⁷ Furthermore, it is not necessary that there be an actual exploitation of the market, for all that is needed is "a substantial change in the supply structure seriously jeopardizing the consumer's freedom of action."¹³⁸ Finally, it must be pointed out that among the other types of conduct which have been condemned by the Court under this category are exclusive supply agreements¹³⁹ and the providing of loyalty rebates.¹⁴⁰

Turning to the second of the general categories of actions which violate article 86, the most striking example is that of unfair price practices. Such behavior may take the form of either very low pricing, entered into with the intent of driving the competition out of the market,¹⁴¹ or very high pricing, which takes place when there is "no reasonable relation [between the price and] the economic value of the product supplied."¹⁴²

Another kind of behavior which has been condemned by the Court as unfair is the imposition of unreasonably harsh conditions within

135. A third category of abuse, namely unlawful acts of economic reprisal against firms, has been construed in Lang, *Monopolisation and the Definition of "Abuse" of a Dominant Position Under Article 86 EEC Treaty*, 16 Common Mkt. L. Rev. 345 (1979).

136. [1973] E.C.R. 215, [1973] C.M.L.R. 199.

137. [1973] C.M.L.R. at 224.

138. *Id.* at 225.

139. *HLR*, [1979] E.C.R. 461, [1979] 3 C.M.L.R. 211.

140. *Id.*; See also *Michelin*, [1983] E.C.R. 3461, [1985] 1 C.M.L.R. 282.

141. With respect to the inevitable losses ensuing from such a practice, the Court has observed that "temporary improfitability or even losses are not inconsistent with the existence of a dominant position." *Michelin*, [1983] E.C.R. at 3511, [1985] 1 C.M.L.R. at 328. See also *Re AKZO*, Commission Decision of 14 December 1985, 28 O.J. Eur. Comm. (No. L 374) 22 (1985).

142. *United Brands*, [1978] E.C.R. at 301, [1978] 1 C.M.L.R. at 502.

contracts. Thus, in the *SABAM* case,¹⁴³ the issue was presented as to whether the Belgian Society of Authors had abused its dominant position by requiring its members, in consideration of protection given to them, to assign to itself all future copyrights. The Court found that the imposition upon its members, by "an undertaking entrusted with the exploitation of copyrights and occupying a dominant position, [of] obligations . . . not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright, can constitute an abuse."¹⁴⁴ It may be useful to recall that this kind of unlawful behavior may be engaged in by a buyer as well as a seller,¹⁴⁵ and may also include discriminatory pricing, insofar as market conditions do not justify such a course of action, i.e., when there are not purely economic reasons behind the discriminatory practice, but only a plan to influence the market.¹⁴⁶

Miscellaneous

A final remark is necessary regarding the provision which extends the reach of article 86 to "more undertakings." It is not clear what is meant by more than one undertaking, and the Court has stated that this provision does not apply to oligopolies where "courses of conduct interact, while in the case of an undertaking occupying a dominant position the conduct of [such an] undertaking . . . is to a great extent determined unilaterally."¹⁴⁷

Section Two of the Sherman Act

The Sherman Act, like its European counterpart, does not leave unregulated as important a threat to competition as that posed by monopolies. Section Two thus condemns "[e]very person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce among the several States or with foreign Nations."¹⁴⁸

Section Two does not delineate any further the concept of monopolization, leaving its interpretation to the courts. In ascertaining the existence of a monopoly, American courts have used the same "three step" analysis¹⁴⁹ which is employed on the other side of the Atlantic:

143. *BRT v. SABAM* (Case 127/73) [1974] E.C.R. 51 (BRT-I) & 313 (BRT-II), [1974] 2 C.M.L.R. 238 & 269.

144. [1974] 2 C.M.L.R. at 284.

145. See *Re Eurofima*, [1973] C.M.L.R. D217.

146. *United Brands* (Case 27/76) [1978] E.C.R. 207, [1978] 1 C.M.L.R. 429.

147. *Hoffman-La Roche*, [1979] E.C.R. at 520, [1979] 3 C.M.L.R. at 275.

148. 15 U.S.C. § 2 (1982).

149. See generally Spivack, *Monopolization under the Sherman Act*, Section 2, 50 *Antitrust L.J.* 285 (1982).

first, the relevant market is defined, with respect to the product as well as to geographic elements; then the power of the subject in that market is assessed. In addition, American courts must also identify the existence of an "intent to monopolize," as required by the Supreme Court's interpretation of the activity proscribed by Section Two.

The Product Market

In defining the relevant product market, the Supreme Court has adopted a "reasonable interchangeability" standard substantially equal to the one used by the ECJ. The analysis was laid down in *United States v. E.I. du Pont de Nemours*,¹⁵⁰ in which the Court was faced with deciding whether its inquiry into the defendant's alleged monopoly was to be made with respect to the market for cellophane or a larger one which included all flexible packaging materials. The Court reasoned that, "[i]n considering what is the relevant market . . . no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purpose make up that 'part of the trade or commerce,' monopolization of which may be illegal."¹⁵¹ The Court further explained that the term "purpose" encompassed "price, use and quality."¹⁵² In *United States v. Grinnell Corp.*,¹⁵³ the Supreme Court, called to decide upon an alleged monopolization in the field of burglary and fire protection services, went further, stating that there is "no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities."¹⁵⁴

Further analysis of the reasonable interchangeability standard reveals the use of three different criteria.¹⁵⁵

The first criterion is based on the capacity of different products to perform the same function. Thus, in *United States v. Continental Can Co.*,¹⁵⁶ the Supreme Court held that cans and bottles were parts of the same market, for both were used as containers. When this position is compared with the one taken by the ECJ, it appears that the latter court has sometimes followed a narrower standard in defining the relevant market, although in theory it has used the same general principle.¹⁵⁷

The second criterion is based on the extent to which customers react to a change in price of a product by substituting it with another one.

150. 351 U.S. 377, 76 S. Ct. 994 (1956).

151. *Id.* at 395, 76 S. Ct. at 1007.

152. *Id.* at 404, 76 S. Ct. at 1012.

153. 384 U.S. 563, 86 S. Ct. 1698 (1966).

154. *Id.* at 572, 86 S. Ct. at 1704.

155. See 2 E. Kintner, *Federal Antitrust Law* 330 (1980).

156. 378 U.S. 441, 84 S. Ct. 1738 (1964).

157. See text accompanying *supra* notes 120-25.

In *Greyhound Computer Corp. v. IBM Corp.*,¹⁵⁸ the plaintiff alleged a monopolization by IBM of the market for the leasing of computers. IBM argued in defense that leasing is only a way of financing the sale of a computer, and that therefore it was involved only in the market for the sale of computers. The court of appeals held, based on the rationale that customers who lease a computer are different from those who buy one, that the leasing and the sales market for computers are different.

The third criterion concerns the ability of other manufacturers to produce the same goods supplied by the alleged monopolist. A good example may be found in the decision *In Re Municipal Bond Reporting Anti-trust litigation*.¹⁵⁹ In that case a suit brought for an alleged monopolization of the information on the secondary market for bonds issued by municipalities was dismissed because the court found that there were "alternatives [which] . . . were reasonable substitutes for the defendant's services."¹⁶⁰

The Geographic Market

The definition of the geographic market affected is unavoidably related to that of the relevant product market. The Supreme Court has made it clear that the notion of a geographic market is flexible and that its determination is related to the extent to which competition is eliminated in a determinant area.¹⁶¹

Monopoly Power

Monopoly power has been defined by the Supreme Court as "the power to control prices or to exclude competition."¹⁶² The possession of a large share of the market has been regarded as strong evidence of the existence of such power, and, although the Supreme Court has always refused to give a specific figure above which it is willing to draw the existence of a monopoly, it is likely that the possession of a market share of over 60-65% would suffice.¹⁶³

158. 559 F.2d 488 (9th Cir. 1977), cert. denied, 434 U.S. 1040, 98 S. Ct. 782 (1978).

159. 672 F.2d 436 (5th Cir. 1982).

160. Id. at 441-42.

161. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 357-59, 83 S. Ct. 1715, 1738-39 (1963); see also *White & White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 500 (6th Cir. 1983).

162. *Du Pont*, 351 U.S. at 391, 76 S. Ct. at 1005.

163. See Judge Learned Hand's opinion in *United States v. Aluminum Co.*: "[Ninety percent] . . . is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not." 148 F.2d 416 (2d Cir. 1945) (sitting as court of last resort by certification of the Supreme Court).

There are also other indicia from which the American courts have found the existence of a monopoly. Among those are: the structure of the market, the chances for other firms to enter it, the integration between manufacturers and sellers,¹⁶⁴ and the existence of very high or very low prices or frequent price changes.¹⁶⁵

Intent to Monopolize

As noted previously, there is another requirement which has to be satisfied in order to trigger the application of Section Two. The courts have required the existence of a *specific intent* to monopolize, as distinguished from "growth or development as a consequence of a superior product, business acumen, or historic accident."¹⁶⁶ This intent, however, is often presumed, since "no monopolist monopolizes unconscious of what he is doing."¹⁶⁷

There are only two ways in which this presumption can be escaped. The first relies on the concept of the so-called natural monopoly, which exists when the total output required can be most efficiently supplied by only one producer.¹⁶⁸ The second is based on the superior skill or fair and successful use of competition by the defendant. To quote again Judge Learned Hand from his opinion in the *ALCOA* case, "The successful competitor, having been urged to compete, must not be turned down when he wins."¹⁶⁹

Attempt and Conspiracy

The other provisions of Section Two prohibit the attempt to monopolize and the conspiracy or combination to monopolize. Although these two offenses have some common features, the main one being that in both cases the defendant(s) are still in a preparatory stage, there are still some significant differences. With regard to the attempt to monopolize, not only is the intent required, but also the existence of

164. *Broadway Delivery Corp. v. United Parcel Serv.*, 651 F.2d 122 (2d Cir. 1981), cert. denied, 454 U.S. 968, 102 S. Ct. 512 (1981).

165. *Id.* at 131.

166. *Grinnell*, 384 U.S. at 571, 86 S. Ct. at 1704.

167. *Aluminum Co.*, 148 F.2d at 432.

168. See *American Football League v. National Football League*, 323 F.2d 124 (4th Cir. 1963), where the fact that the defendant had been established long before the plaintiff and had thus occupied most of the single-team cities was held not to be an unlawful monopoly, for such a situation had developed only for natural and historical reasons and not as a result of unfair practices.

169. *Aluminum Co.*, 148 F.2d at 430. See also *Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1282 (8th Cir. 1981), where the court affirmed the District Court decision that Monsanto had not monopolized the "turf" market and that its possession of a large share of the market was justified by "the superiority of its product."

a "dangerous probability"¹⁷⁰ of succeeding. The conspiracy provision, on the other hand, is triggered only by the action of the alleged collaborators.

IV. JUDICIAL INTERPRETATION OF THE SHERMAN ACT AND COMPARATIVE OBSERVATIONS

A detailed comparison of the specific practices prohibited by the EEC and United States antitrust statutes is beyond the scope of this article. Nevertheless, it is useful to delineate the general interpretative rules used by the courts of the United States in applying the Sherman Act, for such an examination provides an opportunity for comparative remarks relating to the general policies underlying the two antitrust schemes.

Judicial Interpretation of the Sherman Act

As was noted before,¹⁷¹ the American antitrust statutes are broadly drawn and the legislator thus has left to the courts a wide power of interpretation.

The development of this process seems to be oriented toward an increasingly narrow construction of the statute. This orientation can be traced as far back as the landmark *Standard Oil* case. Prior to that case, and shortly after the enactment of the Sherman Act, the Supreme Court held in *United States v. Trans-Missouri Freight Association*¹⁷² that the prohibitions of Section One extended to "every contract or combination in restraint of trade . . . not limited to that kind of contract alone which is in unreasonable restraint of trade."¹⁷³ Fourteen years later in *Standard Oil*, Chief Justice White, after comparing the Sherman Act's provisions with the classical common law rule,¹⁷⁴ concluded that those provisions were to be applied only to those contracts or combinations which create an *unreasonable* restraint of trade, a limitation which has no specific expression in the statute.¹⁷⁵ This principle, better

170. *American Tobacco Co. v. United States*, 328 U.S. 781, 785, 66 S. Ct. 1125, 1127 (1946).

171. See text accompanying *supra* notes 18-19.

172. 166 U.S. 290, 17 S. Ct. 540 (1897).

173. *Id.* at 328, 17 S. Ct. at 554. This principle was reaffirmed in *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 19 S. Ct. 25 (1898), and its reach extended, in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211, 20 S. Ct. 96 (1899), to firms not operating in a business subject to public regulation.

174. See *supra* notes 1 and 2 and accompanying text.

175. *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S. Ct. 502 (1911). This decision followed an extensive debate on amending the Sherman Act to restrict its coverage only to contracts which constituted an unreasonable restraint of trade. An amendment, proposed

known as the "rule of reason," imposes on the courts the task of evaluating the impact of the challenged agreement on competition, by taking into consideration factors such as the nature of the restraint¹⁷⁶ or the power over the market enjoyed by the defendant.¹⁷⁷

The rule set forth in *Standard Oil* received further elaboration in *Chicago Board of Trade v. United States*.¹⁷⁸ In that case, the Court, starting from the assumption that "every agreement concerning trade, every regulation of trade, restrains,"¹⁷⁹ concluded that "the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."¹⁸⁰ Applying those principles, the Court held that an agreement between the members of the Board of Trade, which prohibited the purchase or sale of grain at a price different from that fixed in the last trading session, was pro-competitive, because it prevented the private bidding previously practiced. Thus, the agreement allowed more dealers, who could not participate in such transactions without an adequate knowledge of the market, to engage in the business.

The principles developed in the *Board of Trade* decision have been utilized in a number of cases.¹⁸¹ More recently, however, the Supreme Court has shown a willingness to take other factors into consideration in determining the lawfulness of an agreement. Not only will the Court examine the impact of the agreement on competition in general, but it will also consider how it affects the consumers' position.¹⁸² That is,

in 1909, which aimed to modify the Act in this sense was indefinitely postponed for the fear not only of discrepancies in the Court's interpretation but also of a substantial emasculation of the Act. It is not without significance that it was the future Chief Justice White who wrote the dissenting opinion in the *Trans-Missouri* case.

176. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607, 92 S. Ct. 1125, 1133; *Ratino v. Medical Servs.*, 718 F.2d 1260, 1262-63 (4th Cir. 1983); *Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 449 (9th Cir. 1979).

177. *Chisholm Bros. Farm Equip. Co. v. International Harvester Co.*, 498 F.2d 1137, 1143 (9th Cir.), cert. denied, 419 U.S. 1023, 95 S. Ct. 500 (1974).

178. 246 U.S. 231, 38 S. Ct. 242 (1918).

179. *Id.* at 238, 38 S. Ct. at 244.

180. *Id.*, 38 S. Ct. at 244.

181. See *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613 (1985); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S. Ct. 2549 (1977); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 76 S. Ct. 1698 (1956); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 53 S. Ct. 471 (1933).

182. See, e.g., *NCAA v. Board of Regents*, 468 U.S. 85, 104 S. Ct. 2948 (1984), in which the Court held unlawful a horizontal price agreement because the result would have been unresponsive to consumers' preferences. See also *Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Co.*, 682 F.2d 660, 663 (7th Cir. 1982) (The purpose of the antitrust statutes is to "protect the consumer interest in competition."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 349, 99 S. Ct. 2326, 2333 (1979).

while in the past the Court treated the antitrust statutes as mainly serving to foster competition, on the assumption that such conduct would eventually benefit the consumer, in more recent decisions it seems that the focus has been placed directly on the consumer's welfare, with the protection of competition considered as necessary only insofar as it serves the consumer's interest.¹⁸³

The Per Se Rule

The "rule of reason" is not, however, the only guideline relied upon by American courts in applying the Sherman Act. Alongside with establishing the rule of reason in the *Standard Oil* case,¹⁸⁴ the Supreme Court observed that there are certain agreements whose nature, character and natural effects give rise to "a conclusive presumption which [brings] them within the statute."¹⁸⁵

The first clear formulation of this principle, better known as the "*per se* rule," came in *United States v. Trenton Potteries Co.*,¹⁸⁶ which involved an alleged conspiracy to fix the price of sanitary pottery. The Supreme Court, in dismissing the defendant's appeal, observed that "[t]he aim and result of every price fixing agreement . . . is the elimination of one form of competition."¹⁸⁷ This principle was reaffirmed some years later in *United States v. Socony-Vacuum Oil Co.*¹⁸⁸ In that case a few major oil companies had conspired to buy large quantities of "distress" gasoline, thus creating a shortage which enabled them to maintain their own fixed price for the product. Rejecting an appeal by the defendants, the Supreme Court ruled that "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity . . . is illegal *per se*."¹⁸⁹

Under the "*per se* rule," then, when it has been proved that an agreement belongs to one of certain categories of unlawful agreements, there is no room for application of the "rule of reason," and the agreement is declared void without any further inquiry as to its effects on competition. In deciding which kinds of agreements may give rise to the

183. See *University Life Ins. Co. v. Unimarc Ltd.*, 699 F.2d 846, 852 (7th Cir. 1983), where the court said that the significance of antitrust legislation is not "the preservation of all existing competitors but the maintenance of a sufficient number to assure that consumers get the best possible quality of product at the lowest possible price"; *Products Liability*, 682 F.2d at 664, where the same court analyzed an insurance brokerage dispute solely in the light of the protection of consumer benefits.

184. 221 U.S. 1, 31 S. Ct. 502 (1911).

185. *Id.* at 65, 31 S. Ct. at 518.

186. 273 U.S. 392, 47 S. Ct. 377 (1927).

187. *Id.* at 397, 47 S. Ct. at 379.

188. 310 U.S. 150, 60 S. Ct. 811 (1940).

189. *Id.* at 223, 60 S. Ct. at 844.

irrebuttable presumption of unlawfulness, the courts will typically classify as void "*per se*" those agreements whose benefits might have been obtained without imposing the challenged restraint. Second, the propensity of an agreement toward creating a monopoly will also be considered.¹⁹⁰

It should be noted that the "*per se* rule" seems to have been touched by the movement toward a narrower interpretation of the antitrust statutes.¹⁹¹ Some courts, for instance, have resorted to a solution which combines the characteristics of both the "rule of reason" and the "*per se* rule." This approach, also known as rule of "facial unreasonableness," requires a case by case analysis of the necessity of applying the "*per se* rule," instead of relying on fixed categories, and is based on some Supreme Court decisions which seem to have "blurr[ed] . . . the distinction between the rule of reason and the *per se* approaches."¹⁹²

Comparative Observations

At first glance, a comparison of the American and EEC antitrust statutes reveals some basic similarities. Indeed, the approach taken by both the ECJ and the Commission has frequently involved application of a number of principles which are in common with those followed under the "rule of reason." For example, both the Supreme Court in the *Sylvania* case¹⁹³ and the ECJ in the *Metro* case¹⁹⁴ looked with favor upon vertical restraints in the distribution process, which, although in principle anti-competitive, do possess the pro-competitive quality of strengthening inter-brand competition.

The similarities between the two statutes is limited, however, to those kind of practical applications. Under the Sherman Act, once it has been demonstrated that an agreement violates the prohibitions set by the statute, it may be saved only if the benefit it gives to competition offsets the harm.¹⁹⁵ Conversely, under the EEC approach, there is the

190. 1 E. Kintner, *supra* note 155, at 367-69. Those categories of agreements which have been found unlawful *per se* include horizontal price fixing, division of market, resale price maintenance, tying arrangements and group boycotts. See generally 2 E. Kintner, *supra* note 55, at 57.

191. See *NCAA v. Board of Regents* 468 U.S. 85, 104 S. Ct. 2948 (1984); *Broadcasting Music, Co. v. CBS, Inc.*, 441 U.S. 1, 99 S. Ct. 155 (1979); *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S. Ct. 2549 (1977).

192. Brunet, *Streamlining Antitrust Litigation by "Facial Examination" of Restraints: the Burger Court and the Per Se-Rule of Reason Distinction*, 60 Wash. L. Rev. 1, 27 (1984).

193. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S. Ct. 2549 (1977).

194. *MetroSB-Grossmarkte GmbH v. Commission* (Case 26/76), [1977] E.C.R. 1875, [1978] 2 C.M.L.R. 1.

195. See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688, 98 S. Ct. 1355, 1363 (1978), where the Supreme Court again said that "the Rule of Reason . . . focuses directly on the challenged restraint's impact on competitive conditions."

possibility an exemption under article 85 (3)¹⁹⁶ for economic reasons which may be different from a simple "net positive effect" on competition.

On the other hand, it may be argued that in the last few years American courts have been much more willing to interpret the Sherman Act in a fashion more sensitive toward the needs of the consumers, even if this may in some cases be inconsistent with the overall protection of competition.¹⁹⁷ If this pattern of development continues, American antitrust law may rid itself of those elements which currently distinguish it from the EEC antitrust provisions. Indeed, some practical aspects of the application of the two statutes, other than the general approach, are substantially the same on both sides of the Atlantic. Such aspects include, for instance, the assimilation of parent and subsidiary companies for the purpose of the application of the statutes¹⁹⁸ and the system used to ascertain the existence of a dominant position in a market.¹⁹⁹

Again, however, these superficial similarities cannot mask some basic differences which reflect the different goals of the two statutes. Several circumstances seem to confirm this assumption.

First, the criminal nature of violations of the Sherman Act, an element not present under the EEC scheme, is one reflection of the rigidity which characterizes the U.S. statute²⁰⁰ as opposed to the flexibility, necessary to achieve the integration of the national markets, which is well established in the EEC.

Second, the requirement in the EEC system of a harm to interstate trade as a condition necessary to trigger application of the sanctions²⁰¹ contrasts strongly with the loose interpretation that the United States Supreme Court has given to this requirement.²⁰²

196. See text accompanying supra notes 73-89.

197. See supra notes 182-83 and accompanying text.

198. See supra notes 25 and 92-98 and accompanying text.

199. See text accompanying supra notes 128-34 and 162-65.

200. Of great interest in this context is the decision of the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346 (1985), in which it was held that an antitrust issue in an international setting may be subject to arbitration. The Supreme Court, however, has left open the question pertaining to the enforceability of the award in the United States, subordinating it to an examination by the competent court on the compliance of the award with the general principle of American public policy. Thus, if the decision upon first glance may seem to mark the abdication by the Supreme Court to the character of public policy of Sherman Act to a closer scrutiny, it appears that almost nothing has been practically changed.

201. See text accompanying supra notes 38-50.

202. The Supreme Court has never attached great importance to the requirement, present in the Sherman Act, of harm to interstate commerce. See, e.g., *McLain v. Real Estate Bd.*, 444 U.S. 232, 242, 100 S. Ct. 502, 509 (1980), where the Court concluded: "Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commissions rates"

Third, the Sherman Act prohibits not only monopolies, but even the attempt to create them. The Treaty of Rome, on the other hand, outlaws only the abusive exploitation of a monopolistic position.²⁰³ This provides yet another illustration that certain restrictions of competition are considered *necessarily* harmful in the United States, while in the EEC, anti-competitive behavior may be tolerated as long as it may be useful to achieve the aims of the Treaty of Rome, i.e., creation of an integrated common market combined with economic development. The absence in the U.S. system of a *de minimis* rule is further confirmation of this observation.

Finally and, perhaps most significantly, that the ECJ has not developed any sort of "*per se* rule" which, although in retreat, is still valid in the U.S., is the definitive, if needed, evidence of the greater flexibility of the EEC system and of the need of the U.S. legislation for some amendment which may enable the American courts to cope better with a mature economy.²⁰⁴

203. It is not without significance that article 86 does not speak about "monopoly" but of "dominant position." It is worth remembering, however, that in the *Continental Can* case the ECJ seemed to want to condemn monopolies *tout court*. For portions of the opinion, see text accompanying *supra* notes 136-38.

204. See Gellhorn, Climbing the antitrust staircase, 31 Antitrust Bull. 341 (1986).